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PUBLIC BANK BHD

v.

KEMAJUAN FLORA SDN BHD & ORS

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HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL SUIT NO: 22-17-1998]
8 DECEMBER 2005

C ***CIVIL PROCEDURE:*** *Action - Setting aside - Application to set aside sanction given by Insolvency Department to defend suit - Sanction rescinded earlier and had not been reinstated - Whether there was a subsisting sanction - Whether there was no sanction for court to set aside*

D ***CIVIL PROCEDURE:*** *Costs - Security for costs - Application for - Factors to be considered - Whether sum sought fair and reasonable*

The plaintiff filed two applications by way of summonses in chambers which were (1) encl. 108 for an order, *inter alia*, to set aside the sanction given by the head office of the Insolvency E Department Putrajaya ('the department') to the first defendant's solicitors ('the solicitors'); and (2) encl. 112 for an order that the first defendant pay into the joint account of the plaintiff's and the first defendant's solicitors a sum of RM200,000 by way of security for costs in respect of the counterclaim against the plaintiff. The F factual background was that pursuant to an order of the Melaka High Court, the first defendant had been wound up. On 29 July 2004, the department had given the first defendant sanction to defend the suit herein. However, *vide* letter dated 10 November 2004, the department had rescinded the said sanction. *Vide* letter G dated 4 July 2005 to the solicitors, the Melaka branch of the department stated, *inter alia*, that the directors of the first defendant had fulfilled the condition in order to defend this suit. Neither the department nor the first defendant had filed any affidavit in reply to say that the rescinded sanction had been H reinstated. The issues for determination were (i) whether there was a subsisting sanction for the court to set aside and (ii) whether the sum sought by the plaintiff as security for costs was fair and reasonable.

I

Held (striking out encl. 108):

[1] The department had deemed it fit not to reinstate the sanction that had been rescinded earlier. Hence, as at the date of the application in encl. 108, there was no sanction subsisting in favour of the first defendant, and so there was no sanction for the court to set aside. Enclosure 108 was otiose. (para 4)

[2] The first defendant had filed a counterclaim against the plaintiff to recover the sum of RM136,399,999 on the alleged breach of the terms of the plaintiff's letter of offer giving the first defendant banking facilities. The fact that the first defendant had been wound up *ie*, in liquidation would be sufficient reason to believe that the assets would be insufficient to pay the costs of the proceedings. The court was of the view that the sum of RM200,000 sought by the plaintiff as security for costs was fair and reasonable. (para 19 & 20)

[Order accordingly.]

Case(s) referred to:

Kang Wah Construction Sdn Bhd v. Chan Ai Min Property Sdn Bhd & Anor [1999] 7 CLJ 172 HC ***(refd)***

Northampton Coal, Iron & Waggon Co v. Midland Waggon Co [1878] 7 Ch D 500 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 236(1)(e), 351(1)

Debtors Act 1957, s. 19

For the plaintiff - Lee Choon Hei; M/s Philip Chua & Co
For the insolvency department - Fital Ahmad

Reported by Suhainah Wahiduddin

JUDGMENT

Low Hop Bing J:

Applications

[1] The plaintiff has filed two applications by way of summonses in chambers. They are:

A 1. encl. (108) for an order, *inter alia*, to set aside the sanction given by the Head Office of the Insolvency Department Putrajaya ("the department") to the first defendant's solicitors Messrs Bala Gopal & Associates ("the solicitors"); and

B 2. encl. (112) for an order that within seven days of the order the first defendant pay into the joint account of the plaintiff's and the first defendant's solicitors a sum of RM200,000 by way of security for costs in respect of the counterclaim against the plaintiff.

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Factual Background

[2] Pursuant to an order of the Melaka High Court dated 2 December 2003 *vide* winding up petition No. MT1-28-19-2003, the first defendant had been wound up.

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[3] On 29 July 2004, the department had given the first defendant sanction to defend the suit herein. However, *vide* letter dated 10 November 2004, the department has rescinded the said sanction.

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[4] *Vide* letter dated 4 July 2005 to the solicitors, the Melaka branch of the department stated, *inter alia*, that the directors of the first defendant had fulfilled the condition in order to defend this suit. Neither the department nor the first defendant has filed any affidavit in reply to say that the rescinded sanction has been reinstated.

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[5] The second and third defendants *viz*. Wong Tiang and Lock Kim Lian who are the directors of the first defendant, had been adjudged bankrupt on 2 April 2003 and 15 June 2003 respectively.

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[6] The first defendant had been involved in multiple litigations, involving originating summonses, civil suits, appeals to the Court of Appeal and the Federal Court and have incurred liabilities in relation to taxed costs, amounting to RM320,000, not including the costs of the proceedings in this suit.

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[7] The department through its officer in Melaka Mr. Fital bin Ahmad has expressed no objection to these two applications.

I

Sanction

[8] First defendant's learned counsel Mr. Bala Gopal submitted that the plaintiff is not entitled to object, inter alia, to the sanction to appoint his firm to act for the first defendant, referring to *Kang Wah Construction Sdn Bhd v. Chan Ai Min Property Sdn Bhd & Anor* [1999] 7 CLJ 172 HC.

[9] It was contended by learned counsel Mr. Lee Choon Hei that the sanction given to the first defendant has been rescinded and that the first defendant could not proceed with the counterclaim against the plaintiff.

[10] At this juncture, I shall first consider *Kang Wah Construction, supra,* cited for the first defendant. The facts there reveal that the deputy registrar has dismissed the plaintiff's application for attachment of five properties under s. 19 of the Debtors Act 1957 on the ground that the firm of solicitors appearing for the plaintiff company under liquidation was appointed by the liquidator without the authority of the court or committee of inspection which is required by s. 236(1)(e) of the Companies Act 1965. Ian Chin J held that the defendants being third parties cannot take the objection that the authority of the court or the committee of inspection has not been obtained. In my view, the ratio therein and the issue for determination by me in encl. (108) are completely different. Hence no support can be garnered for the first defendant herein.

[11] In my view, having regard to the facts and submissions in relation to encl. (108), the issue for determination is whether there is a subsisting sanction for the court to set aside.

[12] For the purposes of my judgment, it is absolutely essential for me to put in proper perspective the facts as ascertained from the affidavits and the exhibits filed herein. The true position is that the original sanction which was given by the department has been rescinded, in which case there is no subsisting sanction to enable the solicitors to act for the first defendant.

[13] Although the Melaka branch of the department has written to the solicitors, with a copy extended to the department in Putrajaya, stating that the first defendant has fulfilled the condition set by the department, nowhere was it stated that it was a sanction from the department for the solicitors to act.

[14] In my view, the department has deemed it fit not to reinstate the sanction that has been rescinded earlier. Hence, as at the date of the application in encl. (108), there was no sanction subsisting in favour of the first defendant, and so there was no sanction for the court to set aside. I therefore hold that encl. (108) is otiose. I therefore strike it out with no order as to costs.

Security For Costs

[15] As stated above, the officer of the Melaka branch of the department had no objection to the plaintiff's application in encl. (112).

[16] The first defendant urged the court to consider a figure which would not cause injustice to the first defendant.

[17] I would refer to s. 351(1) of the Companies Act 1965 which provides for the security for costs as follows:

> **351. Security for costs**
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> (1) Where a company is a plaintiff in any action or other legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

[18] Section 351(1) gives the court the discretion to order security for costs in the circumstances stated therein. The discretion being a judicial discretion is not unprincipled but must be exercised according to established judicial principles having regard to the facts and circumstances prevailing in each particular case.

[19] On the facts before me, the first defendant has filed a counterclaim against the plaintiff to recover the astronomical sum of RM136,399,999 on the alleged breach of the terms of the plaintiff's letter of offer giving the first defendant banking facilities. The fact that the first defendant has been wound up ie, in liquidation would be sufficient reason to believe that the assets would be insufficient to pay the costs of the proceedings: *Northampton Coal, Iron & Waggon Co. v. Midland Waggon Co* [1878] 7 Ch D 500 at 503 per Jessel MR as quoted in the MLJ Annotated Statutes of Malaysia Vol 2 [2002 Reissue] p. 569.

[20] In relation to the above facts, I am of the view that the sum of RM200,000 sought by the plaintiff as security for costs is fair and reasonable. I therefore order that the said sum is to be deposited on or before 22 December 2005 with the plaintiff's solicitors who shall deposit the same in an interest bearing account and on their express undertaking not to release the sum and all accrued interest until the final disposal of the counterclaim herein or unless ordered by the court.

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